



# **SJR 32 Subcommittee on Medical Liability Insurance**

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## **58th Montana Legislature**

### **SENATE MEMBERS**

DUANE GRIMES--Vice Chair  
JOHN COBB  
BRENT CROMLEY  
DEBBIE SHEA

### **HOUSE MEMBERS**

GEORGE GOLIE--Chair  
ROY BROWN  
KATHLEEN GALVIN-HALCRO  
DON ROBERTS

### **COMMITTEE STAFF**

JOHN MACMASTER, Staff Attorney  
DAWN FIELD, Secretary  
DAVE BOHYER, Research Director

# **MINUTES**

March 25, 2004

Room 137, State Capitol  
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

**Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### **COMMITTEE MEMBERS PRESENT**

REP. GEORGE GOLIE, Chair  
SEN. DUANE GRIMES, Vice Chair

SEN. JOHN COBB  
SEN. BRENT CROMLEY  
SEN. DEBBIE SHEA

REP. ROY BROWN  
REP. KATHLEEN GALVIN-HALCRO  
REP. DON ROBERTS

### **STAFF PRESENT**

DAVE BOHYER, Research Director  
JOHN MACMASTER, Staff Attorney  
DAWN FIELD, Secretary

### **AGENDA & VISITORS' LIST**

Agenda, Attachment #1  
Visitors' list, Attachment #2

### **COMMITTEE ACTION**

The Subcommittee:

- approved the January 15, 2004 minutes as written.
- selected options for further study/bill drafting from the "List of Options" survey results.

## **CALL TO ORDER AND ROLL CALL**

REP. GOLIE called the meeting to order at 8:07 a.m. The secretary noted the roll, all members were present. REP. GOLIE referred to the meeting as "Decision Thursday" and said the goal of today's meeting was to come up with a final list of options to present to the Legislative Council and ultimately, the 2005 Legislature.

## **THE WISCONSIN HEALTH CARE LIABILITY AND INJURED PATIENTS AND FAMILIES COMPENSATION ACT (HCLIPFCA), DAVE BOHYER, RESEARCH DIRECTOR, LEGISLATIVE SERVICES DIVISION (LSD)**

Mr. Bohyer said the Subcommittee had previously received a copy of his report, *An Overview of the Wisconsin Health Care Liability and Patients Compensation Act* (EXHIBIT #1). He explained that in 1975, during the first medical malpractice liability crisis, Wisconsin lawmakers enacted legislation establishing a program by which a quasi-public entity administers a supplemental or excess liability insurance program for Wisconsin's medical practitioners and facilities. Mr. Bohyer also presented additional details in his discussion of the Wisconsin program.

## **SUBCOMMITTEE MEMBER RESULTS OF "LIST OF OPTIONS" SURVEY**

At the January 15, 2004, meeting of the SJR 32 Subcommittee on Medical Liability Insurance, SEN. COBB initiated a list of options which the Subcommittee agreed to review and prioritize for this meeting. SEN. COBB'S list was combined with additional issues identified by the Subcommittee and staff was asked to prepare a survey and compile the results for future consideration. Mr. Bohyer presented the compiled results and discussed them with the Subcommittee, as listed in *Table 1 and Table 2, "List of Options" Survey Results* (EXHIBIT #2).

## **STAKEHOLDER RESPONSES TO THE "LIST OF OPTIONS" SURVEY RESULTS**

**Pat Melby, Montana Medical Association (MMA)**, distributed a memorandum representing the MMA's position regarding the survey results (EXHIBIT #3). Mr. Melby discussed several of the fourteen issues included in the memorandum which the MMA believes should be given serious consideration by the Subcommittee.

SEN. GRIMES said he had requested a performance audit of the Montana Medical Legal Panel (MMLP) from the Legislative Auditor, but had been informed that the MMA had already performed an internal performance audit of the MMLP. SEN. GRIMES asked if the performance audit would be made available to the Subcommittee members. Mr. Melby said he would attempt to provide the audit results to the Subcommittee members at today's meeting.

REP. ROBERTS asked Mr. Melby if he thought enacting the Wisconsin model in Montana would add stability and a comfort level to the high risk practitioners. Mr. Melby said the MMA does not oppose the Wisconsin law, but said it does have some concerns and that there should be further examination of the law to determine if this would be a benefit to Montana physicians.

SEN. COBB did not believe the rates would be significantly affected by these remedies. He asked Mr. Melby if he believed there would be a material reduction in rates if the Legislature

passed the list of suggestions put forth by the MMA. Mr. Melby said he thought there was little that could be done to reduce rates but that the MMA suggestions would help retard the growth of the rates. Mr. Melby said if the \$1 million of liability coverage was lowered to \$500,000, the MMA would be more comfortable with the proposal.

**Tom Ebzery, St. Vincent Healthcare, Holy Rosary Healthcare, St. James Healthcare**, said the organizations he represents support the Wisconsin model and said:

- the patient compensation fund has merit and that, if enacted, it was essential that physician participation be mandatory;
- unlimited coverage is very important;
- the Subcommittee should consider the Wisconsin law on its own and continue to look at additional tort reform changes as well;
- his organizations strongly believe that ostensible agency must be changed;
- the added expert witness language is an improvement;
- his organizations would like to see the Good Samaritan Law extended to emergency rooms;
- certificate of merit could work in conjunction with the Medical Legal Panel - getting an affidavit or statement from a doctor stating that a case has merit would benefit both parties;
- our practitioners think the Montana Medical Legal Panel should be strengthened, that the results should be admissible in court, and that both parties should more equally share costs;
- the arbitration provisions should be better defined before a final decision is made; and
- the Subcommittee should definitely proceed with the Wisconsin law.

SEN. COBB commented that Mr. Bohyer deliberately left the arbitration issue open because there is such a wide variety of options available under arbitration. Mr. Ebzery said his point was that there is confusion as to what the Subcommittee is actually looking at. If the Subcommittee does make a recommendation, then have it be based on consensus so that everybody understands what type of arbitration is being considered. The Subcommittee must also make sure the final product meets legal and Constitutional requirements. SEN. COBB said it may be easier to gain consensus on enacting a voluntary arbitration process than a mandatory arbitration process.

REP. ROBERTS asked Mr. Ebzery, regarding the Good Samaritan law being extended to emergency rooms, if small hospitals are becoming hesitant to provide emergency care because of the uncertain conditions that naturally exist in an emergency room. Mr. Ebzery said that is definitely the case, that smaller rural hospitals routinely send their emergency room patients to Billings, if at all possible. He said that if the Good Samaritan law was to be extended, he thought this would result in more patients being treated locally at their rural hospital.

SEN. GRIMES asked Mr. Melby to comment on the Subcommittee's low rating of the independent medical examination option. Mr. Melby said while it is important to the MMA, it is not a major issue. He also cautioned that if it is not addressed, it may affect the number of physicians willing to perform independent medical exams.

**Larry Riley, Utah Medical Insurance Association (UMIA)**, offered the following comments on the List of Options survey results:

- regarding the MMLP, said the Montana Medical Legal Panel is working just as intended by the Legislature;
- the Panel is quick, confidential, and economical; and
- it identifies the serious claims.

Mr. Riley addressed the certificate of merit issue; it is a basic right under the Constitution that all citizens are treated equally. Any type of lawsuit may be filed in District Court, with the exception of a medical liability case. It has to go through the additional step of appearing before the Medical Legal Panel. Many states have declared these types of panels unconstitutional because they don't guarantee equal protection. If you have to have an expert report before appearing before the Montana Medical Legal Panel, that report may be very expensive. A filing fee for District Court is about \$200. An expert report may cost anywhere from \$1500 - \$7,000. This, in effect, amounts to asking people to pay that amount as a filing fee. If challenged, the Supreme Court would likely strike this down as unconstitutional.

Mr. Riley also asked to comment on independent medical examinations, saying the process is being abused by plaintiff's attorneys and has had a substantial impact of not allowing some people to get an honest independent medical exam.

**Dr. Jack McMahon, Helena, MMA,** addressed the importance of blameless review in order to maintain the willingness on the doctors' part to continue discussion on how to identify mistakes, how to remedy those mistakes, and how to allow other doctors to benefit from the resulting discussion and examination. An environment in which these situations may be discussed without fear of legal action or lawsuits is critical to the quest of continual improvement of patient care.

REP. ROBERTS asked if doctors are resistant or refusing to participate in such discussions because of the fear of litigation. Dr. McMahon said from his standpoint, peer review is still ongoing and physicians are still willing to constructively participate in order to improve the quality of health care.

**John Flink, Montana Hospital Association (MHA),** distributed a summary of MHA recommendations to the Subcommittee and discussed each recommendation in detail (EXHIBIT #4):

- tort reform;
- Montana Medical Legal Panel;
- quality improvement and risk management; and
- insurance issues.

**Mona Jamison, The Doctors Company (TDC),** commented on several issues:

- She expressed surprise that, after hearing Dr. Anderson's testimony at the January 15, 2004, meeting regarding the need for Supreme Court affirmation of the cap on non economic damages, she did not see that suggestion included on the list of options survey.
- The Wisconsin model is not a "no fault" system, but rather an excess coverage policy. There are only two states with true "no fault" systems and they are limited to birth defects and TDC urges further investigation of these statutes.

- Does Montana really need a Wisconsin-type statute: how many claims does Montana have that would apply under this type of statute in need of this excess coverage.
- A letter dated March 1, 2004, from Leona Egeland Siadek, Vice President, TDC, written to Mr. Bohyer responded to several questions asked by Subcommittee members of Dr. Anderson (EXHIBIT #5) showing that Montana has very few claims in excess of \$1 million and while they are not insignificant, indicate that excess insurance coverage is not going to fulfill the intended purpose.
- She asked the Subcommittee to also consider that the physicians will have to fund the patient compensation fund. Doctors are already paying substantially increased premiums and will have the added burden and expense of this fund, creating even more of a financial burden.
- She urged reconsideration of the independent medical exam and arbitration options.

SEN. GRIMES said Montana statute currently prevents the capping of attorney fees. If Montana adopts the Wisconsin model, this would change and would likely have a great impact of the litigious environment in Montana and could potentially help healthcare costs. Ms. Jamison said the unpredictability of the Montana Supreme Court makes it very difficult to predict the effectiveness of such a measure.

REP. BROWN said there is very little competition among insurance providers and that he saw the lack of competition as a major reason for the skyrocketing rates. He asked Ms. Jamison if she thought that an excess insurance market would create an incentive for other companies to come into Montana. Ms. Jamison said she did not consider herself an expert on the Wisconsin model but that it may be of help. Mr. Bohyer said the information he found did not give a number, only the theory that it would bring additional capacity, since the need to increase reserves for excess payments would be eliminated.

**Brian Zins, Montana Medical Legal Panel (MMLP)**, provided copies of the 2004 Montana Medical Legal Panel Report (EXHIBIT #6). Mr. Zins said because the statistics are so complicated and in-depth, a written narrative would be prepared in order to make it easier to understand. He said he hoped to have the narrative ready within a few days. Mr. Zins said this was the information referred to earlier by SEN. GRIMES in his discussion of the performance audit of the Montana Medical Legal Panel by the Legislative Audit Division (LAD).

**Jani McCall, Deaconess Billings Clinic, Billings**, said she was in support of:

- the MHA recommendations, particularly in tort reform;
- the elimination of ostensible agency;
- the MMA recommendations regarding loss of chance and advance payment;
- reconsideration of the Good Samaritan expansion;
- strengthening the MMLP by adding certificate of merit and advance payment changes; and
- further examination of the Wisconsin model.

**Al Smith, Montana Trial Lawyers Association (MTLA)**, said what really needed to be looked at was how to provide stability. None of the measures discussed today will impact rates dramatically. At best, stabilization will occur if some or all of the measures are implemented.

The MTLA:

- is willing to consider the insurance portion of the Wisconsin model. The \$1 million cap in Wisconsin may not work in Montana, perhaps a \$500,000 cap should be considered.
- opposes the attorney fee limitations because it will prevent legitimate victims from being able to hire an attorney to represent them.
- thinks the Montana Medical Legal Panel does serve its purpose and if changed, will drive up costs for everyone.
- would like to work with the Subcommittee on the details regarding arbitration provisions, ostensible agency, advance payments, captain of ship, and bad faith.
- also supports Medicaid reimbursement increase, the concept of risk pooling, and increased use of insurance captives.

### **SUBCOMMITTEE WORK SESSION/DISCUSSION OF THE "LIST OF OPTIONS"**

The Subcommittee requested testimony from stakeholders on each option, held a brief discussion, and used a consensus approach for the majority of the options to decide if the option would be retained for continued study and/or bill drafting, if it would be placed in the "parking lot" for possible reconsideration at a later date, or permanently eliminated as a possibility. It will be noted in the minutes if a vote was taken.

The following is a summary of the discussion and decisions made from the *"List of Options" Survey Results* (EXHIBIT #2). Each option was first reviewed using the actual survey sent out to Subcommittee members in February (*Options for Consideration Before the SJR 32 Subcommittee on Medical Liability Insurance* -- EXHIBIT #7) and then discussed in order of the ranking it received by Subcommittee members.

### **Wisconsin HCLIPFC Act for Montana (Option 25) -- will proceed to a bill draft request**

Discussion centered around the issue of whether or not enacting this measure would result in the desired result of limiting the cost of malpractice insurance, particularly to high risk practitioners, and if it would decrease the occurrence of frivolous lawsuits. Also of interest to Subcommittee members was administration of the plan and how it would be funded. It was noted that the number of physicians actively practicing in Montana (1,900) is much less than Wisconsin (11,000) and that the vastly different numbers could complicate funding. Mr. Bohyer compared the administration of the Wisconsin model to Montana's State Fund, in terms of management and policy responsibilities.

REP. GOLIE proposed that draft legislation be prepared by staff, taking into account Montana's laws and statutes. The Subcommittee agreed. Mr. Bohyer asked for clarification as to whether the legal fees should or should not be left in the draft legislation. REP. GOLIE directed him to leave the cap on fees in.

### **Arbitration (Option 7) -- placed in "parking lot"**

SEN. COBB said arbitration could either be voluntary or mandatory and the question was how to decide which to pursue. The stakeholders have not yet reached consensus regarding arbitration and there was discussion on whether additional time should be allowed for them to continue their efforts. Mr. Bohyer described voluntary and mandatory models of arbitration,

saying that within each of them, there are binding and non binding outcomes. SEN. GRIMES said the various points of view of Subcommittee members would make it difficult to make a decision. SEN. COBB suggested waiting to see what the working group of stakeholders agreed upon and then the Subcommittee could build on that decision. The Subcommittee agreed to place arbitration "in the parking lot".

#### **Ostensible Agency (Option 13) -- will proceed to a bill draft request**

Mr. Bohyer said there is a longstanding statute that regards ostensible agency in the context of torts. This bill would carve out medical providers and would create a different liability environment for them than for everyone else under general tort laws. Mr. Riley said this is a very big issue for hospitals and it drives up the cost of healthcare. Hospitals have tried many different solutions but these attempts have not been effective. Mr. Melby said requiring the physician to inform the patient that he/she is not an employee of the hospital really doesn't solve the problem because the hospital has no control over the doctor. He encouraged the Subcommittee to draft legislation and said the healthcare providers would continue to work with the defense lawyers to come forward with a compromise that everybody can live with.

Mr. MacMaster cautioned the Subcommittee that there may be a problem with this legislation under the "equal protection" clause in the Montana Constitution and said the Supreme Court has been unpredictable in its rulings regarding this.

Mr. Bohyer said he envisioned the bill draft first amending the existing statute to carve out medical providers from the way that ostensible agency applies in general liability terms. Then, separate language would be created within the medical malpractice code sections, clarifying that ostensible agency does not apply to the medical community. The Subcommittee agreed to proceed with a bill draft request.

#### **Stakeholder Issues (Option 21: a, b, and c.): arbitration, risk pooling, and quality control -- include in Final Report**

SEN. COBB said there usually is a summary of an interim committee's activities published in a Final Report and suggested that solutions and recommendations such as quality control, arbitration, pooling risk, etc., not requiring legislation could be addressed in such a report. The Subcommittee would have to make it clear that these solutions/recommendations may not lower rates dramatically, but could help to alleviate the difficulty. The Subcommittee agreed with SEN. COBB'S suggestion.

#### **Advance Payments (Option 5) -- will proceed to bill draft request**

Mr. Bohyer explained that when a claim is filed and it is reasonably apparent where the responsibility for the injury lies, the insurer is obligated to pay both lost wages and medical expenses of the injured individual. The problem arises in cases where the liability for the injury is not reasonably apparent.

Mr. Riley said the current advance payment and bad faith legislation resulted from claims dealing with automobile accidents. Case law deems that if liability is reasonably clear, the defendant has an obligation to make advance payments. The problem is that it is difficult to

apply the "reasonably clear" standard to medical cases. Mr. Smith agreed that reasonably clear is a high standard to meet and language should be added to help clarify the intent, but cautioned the Subcommittee not to get rid of the entire statute. There are cases where liability is reasonably clear and insurers should have to settle on such cases. Mr. Riley said carriers do pay claims where liability is reasonably clear, but because of the existing uncertainty, many insurance companies have decided it is not worth the risk to do business in Montana.

SEN. GRIMES supported having legislation drafted. Mr. Bohyer said the bill draft, as with ostensible agency, would exclude the medical providers from the general liability statutes and clarify the distinction in the medical malpractice statutes that the advance payment provisions aren't required in medical services cases where it is not reasonably clear that there was negligence or malpractice.

REP. GOLIE asked if establishing a definition of what is reasonably clear would remedy this problem. Mr. Riley said it would help a great deal but suggested also clarifying the Montana Medical Legal Panel rules to clearly indicate that a Panel vote that is 4-2, for example, doesn't establish that liability is reasonably clear. This change is necessary because any settlement made by a doctor is reported to the National Practitioner Data Bank and this information can impact the doctor's ability to get insurance. Making these changes would help alleviate this problem. Ms. Jamison agreed that this issue arises frequently in settlement negotiations and is driving the amounts of the settlements up.

Mr. Bohyer distributed a colored diagram (EXHIBIT #8) illustrating that while the bulk of tort law does apply to doctors and hospitals, very little of it is related solely to medical malpractice. Because the Supreme Court is reportedly unpredictable, the medical profession and insurers are worried that the Court will apply general tort law to the medical malpractice cases.

REP. GOLIE proposed that medical malpractice be separated out from advance payments as generally applicable and that a definition of what is reasonably clear be established. Mr. MacMaster expressed reservation about the legality of such legislation. Mr. Bohyer said the medical community is asking for legislative direction to make it clear to the Court that advance payment is not intended for cases where reasonable fault is not clear. Mr. Bohyer said such legislation could be written and suggested advance payment first be carved out of the automobile insurance provision and then placed in the medical malpractice provisions. Mr. Melby suggested language stating "in a medical malpractice case, 'reasonably clear' means:....". Mr. MacMaster said he wouldn't recommend exempting medical malpractice but would instead define advance payments and add language that the court may not order advance payments in a medical malpractice case. Mr. Bohyer said the draft legislation would be crafted and disseminated to the Subcommittee and the stakeholders before the June meeting. At that time, the stakeholders could advise whether the language meets their needs or if changes need to be made. The Subcommittee agreed.

### **Common Law Third Party Bad Faith (Option 6) -- will proceed to bill draft request**

Mr. Riley said the concept of bad faith is a complex issue and needs clarification of what exactly constitutes bad faith. SEN. GRIMES asked if examples of bad faith legislation from other states were available to use as a template. Mr. MacMaster said a decision would have to be made on

what kinds of bad faith cases would be included or excluded in the bill draft. Mr. Bohyer said staff would work with Mr. Melby to craft the language. The Subcommittee and stakeholders can make changes or approve it at the June meeting. The Subcommittee agreed to proceed with a bill draft request.

### **Captain of Ship Doctrine (Option 8) -- will proceed to bill draft request**

Mr. Riley related a case in which a doctor was held liable for a surgical nurse's action of leaving a sponge in a surgical patient and stated in his opinion, that ruling by the Supreme Court was terrible. Al Smith said the true issue is that of control: who is "in charge" and that currently, that question seems to be open for debate.

REP. GOLIE asked if the captain of ship doctrine would apply if all of the medical providers involved in the procedure were employees of the hospital. Mr. Smith and Mr. Riley agreed that it probably would not apply in that circumstance. Mr. Riley explained that in the Supreme Court case he referred to, the doctor was not an employee of the hospital and practiced there as an independent contractor. REP. GOLIE asked if all of the medical providers were employees of the hospital, if there would be just one claim filed against the hospital, versus multiple claims if independent contractors were involved. Mr. Riley indicated this would be the case. REP. GOLIE asked if a claim involving multiple insurance companies resulted in larger settlements. Mr. Riley said not necessarily, the real problem is the doctor being held responsible for something he/she has no oversight or control over. The surgeon, if acting as an independent contractor, should be responsible only for his/her own conduct. Mr. Zins said the doctrine automatically implies that the captain of the ship applies, irrespective of direct responsibility, and must be removed. Mr. Riley said it would be as simple as adding language to the statute stating the captain of the ship doctrine may not be applied to medical malpractice cases. Mr. Riley also offered an observation he and many stakeholders have discussed: that the cumulative effect of issues such as captain of ship doctrine, loss of chance doctrine, and ostensible agency make for a much more litigious climate against healthcare providers and is largely responsible for scaring insurers away from Montana. If those issues are addressed, the problems caused by bad faith will have substantially been cured.

SEN. GRIMES asked if excluding doctors from the captain of the ship doctrine would prevent full disclosure or responsibility in cases where the doctor did have control. Mr. Riley said it would not and that as a representative of the insurance industry, he would not advocate policy that would result in harm to a patient.

REP. GOLIE said he found it difficult to imagine an operating room in which there was no one officially in charge and asked if the doctors and nurses engaged in "the blame game" when problems arose. Mr. Riley said it happened frequently, that "standard of care" evidence and testimony was particularly important in such a situation, and that there would be fewer frivolous lawsuits filed if captain of ship doctrine was changed.

REP. GOLIE asked Mr. MacMaster to repeat the proposed language for the bill draft regarding the captain of ship doctrine. The language was stated as follows, "The healthcare provider is not liable for the negligence of another healthcare provider who is not his employee or agent and who he does not otherwise control". REP. GOLIE said he could see potential problems with that language.

REP. GOLIE, SEN. CROMLEY, and REP. GALVIN-HALCRO all requested information regarding other states' legislation on captain of ship doctrine. REP. GOLIE instructed staff to include Mr. MacMaster's language in the bill draft and to investigate other states' laws. The Subcommittee agreed to proceed with a bill draft request.

#### **Limit the Discoverability of Quality Initiatives (Option 16) -- eliminated**

Mr. Melby said this issue has already been addressed through the action of the 2003 Legislature and referred to Title 50, Ch. 16, part 2, MCA, which was amended and provided that non-discoverability confidentiality of peer review proceedings and quality assurance activities of hospitals are confidential and not admissible in litigation. Subcommittee members agreed there was no need for further action.

#### **Medicaid Reimbursement Increase (Option 22) -- include in Final Report**

SEN. COBB submitted Medicaid reimbursement data (EXHIBIT #9) intended to give the Subcommittee members a general overview of the Medical reimbursement system in Montana. He asked that this issue be addressed the Final Report and said the 2005 Legislature could consider raising the reimbursement rates for Medicaid for certain providers as a means of paying for some of the costs associated with medical malpractice insurance, as well as limit some of the cost shifting to patients. Most reimbursements range from 41% to 65% of actual cost and the proposal is to increase this by 10%. It will cost the general fund approximately \$1.3 million and won't significantly lower malpractice insurance rates, but will help providers pay for costs.

REP. GALVIN-HALCRO asked if raising the state portion by 10% would decrease the amount the federal government pays. SEN. COBB said the federal reimbursement rate wouldn't change.

SEN. CROMLEY asked if the data in Exhibit #9 represent statewide totals. SEN. COBB said it was the statewide total for providers only, that no nursing homes or hospitals were included.

REP. GOLIE was concerned that this information would get buried in the Final Report and asked if there was another avenue that could be taken that would be more substantive and effective. REP. BROWN recommended putting it in the Final Report since a funding commitment from this Subcommittee is out of the question and also because Medicaid reimbursement rates are issues that should be addressed by the full Legislature. The Subcommittee agreed to place this option in the Final Report.

#### **Informed Consent (Option10) -- placed in "parking lot"**

Montana statutes do not provide for informed consent, according to Mr. Bohyer, and this proposal would require that informed consent be included in the statute. Mr. Riley said there is an informed consent form signed now and in many cases, it resolves the problem. It would be helpful to have the language more clear but this still may not solve the problem because people still will not remember what they have been told. Mr. MacMaster said healthcare providers can and do ask the patient to sign a written informed consent form and he didn't see any need for action on this proposal. The Subcommittee agreed to place this option in the "parking lot".

### **Market and National Forces (Option 19) -- eliminated**

SEN. COBB recommended eliminating this option because of the many different causes and opinions of why medical malpractice liability insurance is a national crisis. Montana can take action that will lessen the severity of the problem but can do little to eliminate it. The Subcommittee agreed.

### **What can the Legislature do? (Option 20) -- eliminated**

REP. GOLIE recommended eliminating this proposal because there will be legislative action. The Subcommittee agreed.

### **Fight Meritless Cases (Option 21D) -- eliminated**

REP. ROBERTS said this should remain a personal decision between a practitioner and his/her attorney and should not be legislated. The Subcommittee agreed.

### **Loss of Chance Doctrine (Option 3) -- will proceed to bill draft request**

Loss of chance allows a claimant in a medical malpractice case to show by a majority of evidence that medical negligence has reduced chances of recovery from illness or injury. In most states, the damages are determined using a proportional approach, which limits recovery to the percentage of chance lost multiplied by the total damages. Montana does not impose proportional limits under a 1985 Supreme Court decision.

Mr. Riley said this is an important piece of legislation. Under current law, the doctor must pay the entire amount of the loss, not just the percentage he is responsible for. The remedy is very simple: clarifying the language to reflect that the damages awarded would be proportional to the loss. Mr. Smith said he would agree to this if the loss was determined to be under 50% but if the loss was over 50% and could be proven by a preponderance of the evidence that the injury/loss has occurred, then the plaintiff should receive the whole amount. Mr. Melby said if negligence is determined, the doctor should be held responsible only for the injury he caused and not for the entire damages.

SEN. COBB asked to have staff check if other states use the proportional approach and to draft the bill using a proportional balance, with the caveat that the Subcommittee may make changes, depending on the content of the other states' laws. REP. GOLIE said the bill should be drafted with a 50% threshold, similar to the requirements of joint/several liability. The Subcommittee agreed to proceed with a bill draft request.

### **Offset Personal Consumption Expenses (Option 4) -- placed in "parking lot"**

In a survival action, economic consumption may not be deducted from the future lost earnings calculation. In contrast, if the party's injury has resulted in death, and if a wrongful death action was awarded, economic consumption would be deducted from the award.

There was little agreement among Subcommittee members or stakeholders on how best to proceed on this issue. Possible scenarios in application of this option were discussed, for

example, how a person who was unemployed at the time of the injury would be dealt with, as well as how this option may impact other legislation. It was agreed to place this option in the "parking lot".

**Strengthen Montana Medical Legal Panel (MMLP) (Option 11) -- will proceed to a bill draft request**

REP. GALVIN-HALCRO said she wasn't convinced this measure should be pursued due to previous testimony from physicians indicating that most were satisfied with the Montana Medical Legal Panel and asked the stakeholders to comment. Mr. Zins said the MMLP does work and the MMA does not support measures to change the Panel in any way. REP. GOLIE asked if the MMLP findings should be admissible in court. Mr. Zins said this would very likely destroy the Panel because it would make the Panel a much more formal process, similar to a trial, and take away the confidentiality. Mr. Smith agreed with Mr. Zins that there is no need to change the MMLP. Mr. Riley commented that in many cases, simply the opportunity for the patient to confront the doctor in the Panel setting and be heard results in resolution and the case goes no further.

Mr. Ebzery agreed that the MMLP does serve a purpose but believes it should be strengthened and could be improved. The hospitals he represents strongly recommend that this proposal move forward for further examination and have three specific recommendations for consideration:

- allowing evidence used in the MMLP to be admissible in District Court;
- allowing the decision made by the MMLP to be admissible in District Court; and
- implementing cost sharing between the plaintiff and defendant.

REP. GOLIE said if all of those measures were implemented, the expense of the MMLP would greatly increase and asked what would be gained. Mr. Ebzery said it may result in an added expense initially but result in fewer large verdicts and less frivolous litigation.

SEN. GRIMES suggested that the Subcommittee take no action at this time but wait for the LAD review of the MMLP information. This would allow the Subcommittee to separate anecdotal information from factual information and make it much easier to make a more informed decision.

REP. BROWN recommended that Mr. Bohyer draft a bill, which would be subject to review at the June meeting. The Subcommittee agreed.

**Get Claims Settled Faster (Option 23) -- eliminated**

The Subcommittee, with little discussion, agreed to eliminate this option from further consideration.

**State-Run, Stop-Gap Liability Coverage (Option 41) -- eliminated**

REP. BROWN stated Montana could not afford a state-sponsored liability insurance program for physicians. The Subcommittee eliminated this option from further consideration.

### **State Subsidies to Providers (Option 43) -- eliminated**

The Subcommittee, with little discussion, agreed to eliminate this option from further consideration.

### **Insurance Reform: California's Proposition 103 (Option 46) -- eliminated**

The Subcommittee, with little discussion, agreed to eliminate this option from further consideration.

### **Institute Experience Rating (Option 50) -- eliminated**

REP. GOLIE asked the insurance providers if this was already being done by the insurance companies. Ms. Jamison confirmed this was being done. REP. GOLIE said there was no need for the Subcommittee to act on this and recommended the Subcommittee eliminate this proposal. The Subcommittee agreed.

### **Spread the Risk More Broadly (Option 51) -- eliminated**

Mr. Bohyer said this measure would be a significant insurance reform that would put disparate practices together so the high risk specialties would be melded with the lower risk specialties, with the lower risk picking up a portion of the tab for the higher risk. Ms. Jamison stated firm opposition to this measure, saying it could result in causing the two remaining medical malpractice liability insurance companies to exit the Montana market. The Subcommittee agreed to eliminate this proposal.

### **Insurance Reform (Option 24) -- eliminated**

The Subcommittee, with little discussion, agreed to eliminate this option from further consideration.

### **Require Risk Prevention (Option 48) -- eliminated**

The Subcommittee, with little discussion, agreed to eliminate this option from further consideration.

REP. GOLIE said the remaining options received either a tie vote or less than 50% of the Subcommittee's support for further consideration. SEN. COBB suggested, that of the remaining options, the Subcommittee consider only those options specifically requested for discussion by members, vote on them, and discard the remaining options.

### **Expand Good Samaritan Law (Option 12) -- eliminated on a 5-3 vote**

SEN. SHEA asked for additional discussion on the Good Samaritan Law. Mr. Bohyer said this reform was intended to provide some level of immunity to emergency room doctors in the emergency room. Mr. Riley said the current Good Samaritan Law requires that a healthcare provider who renders emergency care at the scene of an accident is not liable for the care that is provided. An emergency room, which is equipped and staffed for these very situations,

cannot be compared to an accident scene, and therefore, emergency room doctors and personnel should not be exempt from liability. REP. ROBERTS asked if smaller hospitals are referring emergency cases to larger hospitals because of the risk factors associated with emergency room patients. Mr. Riley said it is a balancing act because a small hospital cannot afford to purchase and maintain expensive emergency room equipment, nor do they have the experienced specialty practices that the larger hospitals have. This is why many of the emergency patients are referred to the larger hospitals.

SEN. SHEA asked for suggestions on how to provide relief. Mr. Ebzery suggested changing the "standard of care" definitions for emergency room care and agreed with SEN. SHEA that this is a problem for hospitals. REP. GALVIN-HALCRO was in favor changing the definition of "standard of care" for emergency room care, rather than a full revamping of the Good Samaritan Law. Mr. Melby said he didn't think applying the Good Samaritan Law in the emergency room would solve the problem and suggested also placing a limit of \$50,000 limit on non economic damages, saying this would be a more effective solution.

The Subcommittee voted to eliminate further consideration of the Good Samaritan Law (5 for elimination, 3 to retain).

#### **Independent Medical Exam (Option 9) -- eliminated on a 4-4 tie vote**

SEN. GRIMES asked for a re-vote on the Independent Medical Exam (Option 9). REP. GOLIE agreed to a vote and it was eliminated on a 4-4 tie vote.

#### **Hedonic Loss Limits (Option 14) -- eliminated on a 4-4 tie vote**

REP. BROWN asked to discuss hedonic loss limits and said this issue was in need of clarification. SEN. GRIMES reported that **Greg Petesch, Code Commissioner, LSD**, had not found any court cases pending before the Montana Supreme Court that he felt threatened the statutory definition of noneconomic damages and, therefore, did not see the need for further consideration of this option. Mr. MacMaster said he also had researched this issue and reported that, to date, there has not been a Montana Supreme Court case either accepting or rejecting hedonic loss. Mr. Smith said there is a case pending before the Supreme Court but did not know if it had been completely briefed yet. SEN. CROMLEY said he thought current Montana statute addressed this issue. Mr. Riley stated he was greatly concerned about the case pending before the Supreme Court and a decision to accept the concept of hedonic damages would make it very difficult for insurance companies to continue to operate in Montana. Mr. Melby supported Mr. Riley's comments and stated he would like to see a bill clarifying that hedonic losses are not allowed in Montana. Ms. Jamison added that a hedonic loss claim would be simply an avenue through which to collect additional damages and suggested investigating how other states have dealt with this issue. REP. GOLIE said he thought this issue had already been addressed in the current Montana statutes on noneconomic damages and was not in favor of further action at this time. The Subcommittee voted to eliminate further action on hedonic losses on a 4-4 tie vote.

REP. BROWN said he would like to see expert witness qualifications be defined statutorily and had a specific proposal.

REP. GOLIE asked to delay discussion on this matter in order to allow public comment for several audience members who had been waiting for quite some time. REP. BROWN agreed.

### **PUBLIC COMMENT/OTHER STAKEHOLDERS IN MEDICAL MALPRACTICE LIABILITY INSURANCE**

**Dr. John Beighle, DPM, Missoula**, submitted and read a memorandum to the Subcommittee regarding his skyrocketing malpractice insurance rates (EXHIBIT #10).

### **Certificate of Merit for Expert Witness (Option 15) -- will proceed to bill draft**

The Subcommittee resumed its discussion of REP. BROWN'S proposal regarding certificate of merit for expert witness.

Mr. Ebzery stated the issues of certificate of merit and expert witness were being confused and should be considered as two separate issues. He explained that a certificate of merit is an affidavit by a physician that a particular case has enough merit to either proceed to litigation or to be heard by the Montana Medical Legal Panel, while expert witness requirements pertains to the qualifications a witness must possess in order to testify before a District Court. Certificate of merit has been adopted in many states and he would support implementing this portion of the option. The language would clearly state that prior to the MMLP and subsequent litigation, an affidavit from an independent physician as to the merits of the claim must be filed. The plaintiff's attorney would be responsible for obtaining the affidavit and it would be filed with the MMLP, becoming part of the record.

It was agreed that the issues were two separate issues. REP. GOLIE said since REP. BROWN had specifically mentioned expert witness qualifications, the discussion would begin there. REP. BROWN said he had expert witness legislation prepared. REP. BROWN and REP. ROBERTS submitted a draft of their proposed legislation providing for expert witness qualifications (EXHIBIT #11), similar to the bill introduced by REP. BROWN in the 2003 Legislature. REP. ROBERTS explained the purpose of the draft bill was to qualify the characteristics of witnesses that will be permitted to testify within the courts. This would ensure that people testifying would provide expert and reliable information that would allow for an accurate assessment.

Ms. Jamison said The Doctor's Company would support expert witness qualification legislation but requested further study before giving it an official endorsement and cautioned that it must be drafted very carefully in order to not infringe on the Court's domain.

Mr. Melby said the reason REP. BROWN'S 2003 bill had not received support was because it was introduced late in the legislative session and there was not time enough to adequately assess it. He recommended working with the stakeholders well in advance of the 2005 Legislature in order to ensure that a new draft bill would be one that everyone can be comfortable with. Mr. Riley said another problem with the 2003 bill was that the lobbyist who drafted it did not consult with anyone and it was poorly thought out, but that he liked this new draft and would support it. Mr. Smith agreed with Mr. Riley's opinion of the 2003 bill and said he would like to have time to study it before official endorsement. REP. GOLIE asked if this [draft] was to be enacted, if it would act as a guide to the judge in determining expert witness

qualifications. Mr. Smith said the courts already do this; a bill would clarify it in law. REP. GOLIE asked if this proposed legislation would have a detrimental effect on future cases - perhaps undo case law or infringe on the judge's determination of expert witness. Mr. Smith said that was a possibility. Mr. Melby recommended developing expert witness qualifications specific to medical malpractice cases. The current expert witness rule is very broad and applies to anyone who is called as an expert witness in a case. The courts have to apply the rules on a case-by-case basis. Mr. Riley commented that he thought District Court judges would welcome this legislation and he strongly recommended this draft bill be presented to the 2005 Legislature. REP. GOLIE asked if the legislation should target medical malpractice only. Mr. Riley replied "yes". REP. GOLIE asked if that would ripple through other professions and cause additional requests for expert witness clarification. Mr. Riley said other professions would continue to operate under Rule 703 [Rules of Civil Procedure], which says an expert may testify if he/she is qualified by training or experience, but that other specialties may request additional clarification as a result of this legislation.

SEN. COBB asked if the Subcommittee was infringing on the Courts' Rules of Civil Procedure and Evidence. Mr. MacMaster said this would not be an infringement on the Courts' powers.

REP. ROBERTS proposed that the Subcommittee adopt the proposed draft legislation and have it in official draft form at the June meeting for final decision. Mr. Ebzery supported this statement, saying he was in strong support of it and suggested making it part of the total package of legislative recommendations the SJR 32 Subcommittee would make to the Legislative Council. The Subcommittee agreed to move forward with the expert witness draft legislation.

#### **Apology Without Guilt -- will proceed to bill draft**

REP. ROBERTS asked members to consider Apology Without Guilt, Item 13, in *Medical Malpractice Recommendations by REP. BROWN and REP. ROBERTS* (EXHIBIT #12). He said doctors are in the medical profession because they genuinely care for people but are very fearful that expressions of sympathy or empathy will be construed to be an admission of guilt and used against them. Mr. Melby said there was a bill drafted but never introduced in the 2003 Legislature and suggested using that bill draft as a starting point. Mr. Bohyer said he wanted to be clear on the intent of the legislation. The Subcommittee agreed to move forward with this proposal, using the 2003 bill draft, LC 1000.

#### **Joint Underwriting Associations (Option 44) -- will proceed to bill draft**

REP. ROBERTS referred to EXHIBIT #9, Item 15, and said this would greatly benefit podiatrists in their ability to get insurance. A fallback option run by the state would make insurance coverage available when the voluntary market is unwilling to provide coverage. Mr. Zins said the joint underwriting law passed approximately ten years ago had recently sunsetted. Re-enacting it should be easy because the previous bill could be used as the template. The MHA supports this and would like to see it included in the package of proposals. Mr. Bohyer asked for clarification that this was to be a bill to reenact the bill that was sunsetted. The Subcommittee agreed to have staff draft the bill, using the sunsetted bill as the template.

### **Certificate of Merit (Option 15) -- eliminated on a 5-3 vote**

REP. ROBERTS referred to EXHIBIT #9, Item 4, Certificate of Merit, and said this requirement would help reduce frivolous lawsuits. Mr. Riley spoke strongly in opposition to this measure, saying the effect of this option would be to destroy the MMLP, and replace it with a malpractice trial. It would be very expensive and time consuming for both sides. Mr. Ebzery disagreed with Mr. Riley, reasoning that an affidavit signed by a qualified independent doctor stating that the case has merit would dovetail nicely with the MMLP's requirements. Mr. Smith stated that certificate of merit "is a disastrous idea" and would not only add expense and time, but could also potentially result in an equal protection argument because this requirement would apply only to medical malpractice cases. No other type of litigant has to obtain a certificate of merit.

The Subcommittee eliminated this proposal on a 5 - 3 vote, with REP. GOLIE voting "no" with SEN. SHEA's proxy.

### **COMMITTEE ADMINISTRATION**

REP. GOLIE asked if there were any remaining options Subcommittee members wished to discuss. Being none, the remaining options on the survey list were eliminated from further consideration by declaration of REP. GOLIE.

Mr. Bohyer said he was not necessarily recommending that the Subcommittee schedule an additional meeting, but if Subcommittee members did wish to schedule another meeting beyond the June meeting, it should be scheduled as soon as possible. After discussion, it was decided to not schedule an additional meeting.

The staff and Subcommittee discussed whether or not the proposed bills should be presented as individual bills or as a package. It was decided that the proposals would go forth as individual bills at this time.

SEN. GRIMES asked if the Subcommittee could send the list of options, as draft bills, directly to the 2005 Legislature or if they would have to be approved by the Legislative Council first. Mr. Bohyer said the Subcommittee could make recommendations to the Legislative Council, but as a subcommittee of the Legislative Council created expressly to study this issue, it was likely that the Council would want the opportunity to review and discuss the decisions made by the Subcommittee.

### **ADJOURN**

With no further business before the Subcommittee, REP. GOLIE adjourned the meeting at 5:25 p.m.

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